



THE STATE EDUCATION DEPARTMENT / THE UNIVERSITY OF THE STATE OF NEW YORK

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The Honorable Philip H. Rosenfelt
Acting Secretary of Education
U.S. Department of Education
400 Maryland Avenue, SW
Washington, DC 20202-6100

RE: Request for a Waiver of Statutory and Regulatory Requirements of the Elementary and Secondary Education Act (ESEA) on behalf of all LEAs in New York State

Dear Acting Secretary Rosenfelt:

Section 8401 of the Elementary and Secondary Education Act (ESEA), as recently amended by the Every Student Succeeds Act (ESSA) (hereafter referred to as ESSA), provides authority to the Secretary of the United States Department of Education (USDE) to waive certain statutory and regulatory requirements at the request of a State Educational Agency. By way of this letter, the New York State Education Department (NYSED or "the Department") is formally requesting a waiver of the accountability requirements in Sections 1111(c)(4) and 1111(d)(2)(C)-(D) on behalf all Local Education Agencies (LEAs) in New York State.

As required in Section 8401 of ESSA, NYSED is submitting a formal request, containing the information described in subsection (b)(1) to the USDE for its consideration. This waiver request is being submitted based upon ongoing consultation with LEAs and other stakeholders across the state and a review of the impact of the ongoing COVID-19 pandemic. The Department is requesting New York State be granted a waiver of the identified sections for the 2020-21 school year. Below is a detailed plan that addresses each requirement in Section 8401(b)(1) of ESEA/ESSA.

A. Identify the Federal programs affected by the requested waiver.

Title I, Part A Improving Basic Programs Operated by Local Educational Agencies
Subpart 1-Basic Program Requirements, Section 1111 State Plans

B. Describe which Federal statutory or regulatory requirements are to be waived.

NYSED requests a waiver for the following statutory requirements:

- Accountability and school identification requirements in sections 1111(c)(4) and 1111(d)(2)(C)-(D): the requirements that a State annually meaningfully differentiate all public schools and the requirements to identify schools for comprehensive and targeted support and improvement and additional targeted support and improvement.

Rationale for Waiver Request:

Under ESSA, the New York State accountability system assigns a Level from 1 to 4 to each accountability subgroup for each indicator for which a school or district is accountable based on the subgroups' performance on the indicators, where 1 indicates the lowest performance and 4 indicates the highest performance. These levels are used to determine a school's and a district's accountability status based on the level of performance assigned to subgroups for which the school or district is accountable. Even in cases where data can be collected for the individual accountability indicators in order to make determinations at the elementary/middle and high school levels, there is much concern that such determinations for the 2020-21 school year will be distorted by the disparities across the State in learning modality and device/internet connectivity access. These disparities will undermine the Department's ability to make accurate judgments about individual indicators and overall school and district performance, effectively negating the ability to meaningfully differentiate identifications and/or appropriate supports.

In studying the impact of COVID-19 on student learning outcomes, researchers at Columbia University have discovered significant disparities in the degree to which ESSA accountability subgroups are receiving instruction through remote learning during the pandemic. Specifically, the researchers found that:

Schools recording the lowest third-grade math scores are nearly twice as likely to be closed compared to schools recording the highest math scores. The average racial composition of closed schools is 25 percentage points less white compared to schools operating in-person (40% versus 65%). Moreover, closures are more common in schools with a higher share of students who experience homelessness, are of limited English proficiency, are eligible for free or reduced-price school lunch, live in single-parent families, or are racial/ethnic minorities. Distance learning is more common in high schools and middle schools relative to elementary schools, but disparities in exposure to distance learning are comparable across school type. Given the potential negative consequences of school closures on educational performance, the vast inequalities in exposure to distance learning portend rising disparities in learning outcomes.¹

In part due to these disparities in learning experiences, Scott Marion, Executive Director at the National Center for the Improvement of Educational Assessment argues that "using [statewide assessment] scores in school accountability systems—whether

¹ Parolin, Z., & Lee, E. (2020, November 15). Large Socio-Economic, Geographic, and Demographic Disparities Exist in Exposure to School Closures and Distance Learning. <https://doi.org/10.31219/osf.io/cr6gq>.

federally or state-mandated—during the 2020-2021 school year may lead to serious potential unintended consequences.”² Dr. Marion further states that “disentangling the cumulative and uneven effects of the pandemic from school performance will be difficult, if not impossible, to achieve. Attributing outcomes to school performance is uncertain in any year, but it is simply indefensible immediately following the pandemic.”³ Daniel Koretz, a research professor at the Harvard Graduate School of Education, has similarly argued that discerning trends in a typical fashion has been disrupted beyond the point of being useful, including for accountability, and that states could not trust comparative data.⁴ Randi Weingarten, the president of the American Federation of Teachers, wrote:

We know there are concerns that not having this data will make student achievement during covid-19 and particularly deeply troubling equity gaps less visible, that this will mean two years of lost data. However, there is no way that the data that would come out of a spring 2021 testing cycle would accurately reflect anything, and certainly not accurate enough to hold school systems accountable for results. But curriculum-linked diagnostic assessment is what will most aid covid-19 academic recovery, not testing for testing’s sake.⁵

It is the inability to accurately or reliably untangle pandemic impact from school performance on certain accountability indicators that undermines NYSED’s ability to meet the intent of the ESEA/ESSA statute and necessitates the requested waiver.

Among numerous measures that demonstrate the uneven effects of the pandemic on students and their academic achievement and growth, the manner in which schools across the State have provided instruction in the 2020-21 school year is particularly clear. A September 2020 survey of instructional models issued by the Department revealed that nearly 63% of schools planned to start the school year providing hybrid instruction, compared to 20% that planned to provide full in-person instruction and 17% of schools that would provide remote only teaching and learning. While the rate of schools planning remote only learning was the lowest of the three models, those schools providing remote only instruction tended to be located in urban settings and were more likely to serve communities with higher concentrations of students from racial and ethnic subgroups. Students attending schools in four of the five largest districts in the State began the year in remote only teaching and learning. Many of those same schools have yet to open for in-person instruction as of the time of this waiver submission.

In districts that provided families the opportunity to choose between in-person and remote instruction models, data collected by the Department indicate that students of color were more likely to select remote instruction compared to their White peers and are more likely to continue in remote learning once in-person options are made available. For example, according to New York City Department of Education’s October 9, 2020 Learning Preferences Survey, 52% of students – totaling more than 500,000 students –

² <https://www.nciea.org/blog/rethinking-school-accountability-2020-2021-school-year>.

³ Ibid

⁴ <https://www.edweek.org/teaching-learning/states-push-to-ditch-or-downplay-standardized-tests-during-virus-surge/2020/11>

⁵ <https://www.washingtonpost.com/education/2020/12/30/calls-are-growing-biden-do-what-devos-did-let-states-skip-annual-standardized-tests-this-spring/>

selected remote instruction over blended or in-person options.⁶ The same survey data revealed significant differences between racial groups. The families of 43% of Black students and 41% of White students selected remote-only learning, whereas more than 75% of the families of Asian students and about half of the city's Hispanic students selected remote-only learning.

NYSED anticipates that a significant percentage of students who have learned exclusively in a remote setting all year or those that elected to transition from an in-person or hybrid model to a remote learning environment due to health and safety concerns will be unable to participate in such assessments as the State may administer in the 2020-21 school year, which must be administered in-person. Given the disproportionate participation in remote learning among the various subgroups, NYSED anticipates that participation in State assessments will be similarly disproportionate and will significantly compromise the Department's ability to meaningfully differentiate school and district performance for academic indicators by student subgroup.

Further complicating the extraordinary task of trying to distinguish pandemic impact and school performance concerns is the issue of student access to a computing device for their exclusive use and consistent, reliable access to high-speed internet (e.g., via a hotspot) at a sufficient level to fully participate in remote/online learning. In its July 16, 2020 re-opening guidance, NYSED noted that "Even before the COVID-19 pandemic, the inequitable access to technology and internet services in students' places of residence was a priority to be addressed. The closure of New York schools and subsequent shift to remote learning only highlighted this urgent need. The period of remote learning due to school closures presented significant challenges, especially due to the digital divide."⁷ In numerous districts across the state – including those forced to deploy hybrid and remote learning models due to fiscal constraints or state-mandate health and safety protocols – supply chain issues delayed student access to computing devices for weeks and, in some cases, months. A Fall 2020 Digital Equity survey issued by NYSED revealed that statewide more than 215,000 students did not have access to a dedicated computing device. Students in urban/suburban/high needs schools were twice as likely as their peers in average need schools to lack access to a device and five times more likely than their peers in low-need districts.

For many students, including those in both rural and urban settings, access to reliable internet services prevented students from accessing learning materials and synchronous instruction. Students from low-income families, homeless students, and migratory students were disproportionately impacted by this lack of access to critical learning elements. The Fall 2020 survey issued by NYSED revealed that 165,000 students statewide lacked sufficient internet access to fully participate in learning in their home or place of residence. Cost is the most reported barrier to students having sufficient internet access at their places of residence, except for rural schools, where the top barrier is availability. As with the issues identified for instructional modality, access to device/connectivity issues will be disproportionate among districts and subgroups and will

⁶ <https://ny.chalkbeat.org/2020/10/13/21515236/more-than-half-of-nycs-public-school-families-have-opted-for-online-only-learning>

⁷ <http://www.nysed.gov/common/nysed/files/programs/reopening-schools/nys-p12-school-reopening-guidance.pdf>

compromise the Department's ability to meaningfully differentiate school and district performance for academic indicators by student subgroup.

In addition to negative impacts on academic indicators, the combination of instructional modality and device/connectivity access issues will have an inconsistent impact on rates of student attendance – an important measure of school quality and student success in the state's accountability system. In its reopening guidance issued July 16, 2020, NYSED required that "Schools must develop a mechanism to collect and report daily teacher student engagement or attendance."⁸ However, many schools across the state reported difficulties at the beginning of the school year implementing systems for collecting attendance, particularly for those students in hybrid and remote only learning environments. The issue of collecting attendance for students not physically in attendance at the school building is also complicated by the use of both synchronous and asynchronous learning within a remote model. Issues of attendance are exacerbated by a lack of access to a dedicated computing device and reliable internet connectivity for many students. As a result, any measure of chronic absenteeism is likely to become a de facto measure of learning modality, device access, and connectivity reliability instead of school or district performance and, therefore, should not be used for accountability determinations.

Should the Department be compelled to differentiate performance to comply with Sections 1111(c)(4) and 1111(d)(2)(C)-(D), we anticipate significant risk of classification errors that will not only invoke great resistance in the field and undermine support for the system, but also result in a misallocation of resources by NYSED and LEAs. There is strong reason to believe that relative performance of schools in the 2020-21 school year is not a reliable measure of how these schools will perform once full in-person learning resumes. Given the differences in student participation in various learning models and the negative impact on both academic and attendance indicators caused by inconsistent access to computing devices and internet connectivity, NYSED cannot meet the requirements of the ESEA/ESSA statute or the equity goals established in its approved ESSA plan and must be granted the requested waiver.

C. Describe how the waiving of such requirements will advance student academic achievement.

The requirements for which NYSED seeks a waiver are only the first component in a larger system ultimately designed to ensure all students have consistent and comparable access to the supports, services, and opportunities needed to achieve improved and equitable educational outcomes.

During the development of its approved ESSA Plan, the NYS Board of Regents committed to increasing equity of outcomes in New York State's schools, in part, by explicitly designing the State accountability and support system to require schools and districts to a) reduce gaps in performance between all subgroups, b) incentivize districts to provide opportunities for advanced coursework to all high school students, c) continue

⁸ <http://www.nysed.gov/common/nysed/files/programs/reopening-schools/nys-p12-school-reopening-guidance.pdf>

to support all students who need more than four years to meet graduation requirements, and d) work with all students who have left school so that they can earn a high school equivalency diploma.⁹ Waiving the requirements of Section 1111(c)(4) and Section 1111(d)(2)(C)-(D) requirements for the 2020-21 school year will provide NYSED with the flexibility needed to collaborate with schools and districts to (1) better understand the pandemic's impact on school communities, including the impact on indicators not currently included in the State's ESSA accountability system and (2) identify appropriate actions to meet the academic, social-emotional, and physical health and safety needs of students. For example, the Department will collaboratively study the impact of remote, in-person, and hybrid models on outcomes such as, but not limited to: student academic achievement and academic growth on available assessment data; academic growth; attendance; English Language Proficiency gains; credit accrual; four-, five-, and six-year graduation rates; teacher turnover; parent family engagement; and fiscal equity. Ultimately, understanding the impact of the pandemic on those indicators for all student subgroups will better inform the Department's short- and long-term deployment of supports, technical assistance, and fiscal resources based on the needs of each unique school community.

D. Describe the methods the State educational agency, local educational agency, school, or Indian tribe will use to monitor and regularly evaluate the effectiveness of the implementation of the plan.

In addition to the planned study of the pandemic's impact on school communities noted above, NYSED will maintain its focus on providing high-quality support to 228 Comprehensive Support and Improvement (CSI) Schools, 258 Targeted Support and Improvement (TSI) Schools, and 216 Target Districts. NYSED will sustain or expand the vast majority of the supports that existed prior to the COVID-19 pandemic. Previously identified districts and schools will be required to develop annual improvement plans and receive both fiscal assistance and technical assistance on implementing their improvement strategies.

The Department's Office of Innovation and School Reform will continue the established progress reporting and management process for 38 Receivership/CSI Schools for the remainder of the 2020-21 school year and throughout the 2021-22 school year. This process consists of regularly submitted progress reports, performance review calls, and site visit monitoring (with virtual visits taking place until in-person site visits are once again possible). Receivership Schools will also be required to engage in ongoing monitoring of established Demonstrable Improvement indicators.

All 228 CSI Schools will be required to submit their improvement plan to NYSED for approval. Prior to this, the Department's Office of Accountability staff will work closely with principals of CSI Schools to support their development of the improvement plan. After the plan is approved, the Department partners with the CSI Schools throughout the school year to provide technical assistance on the implementation of the improvement

⁹ <http://www.nysed.gov/common/nysed/files/programs/essa/nys-essa-plan.pdf>

plan. In addition to standard support options, five enhanced support models will continue to be made available to 190 identified non-Receivership Comprehensive Support and Improvement schools. For 258 TSI Schools, this support will continue to be handled primarily by the District, based on the guidance outlined by the Department.

In addition to a focus on high-quality support, NYSED will also continue and expand its collection and communication of available student data. NYSED has a robust data collection and reporting system that will be leveraged to provide parents, school and district leaders, and the public with available data on how students are achieving and progressing. This data system is not limited to test result data and includes detailed information on student enrollment, attendance, course completion, and graduation as well as school climate. In 2020-21, NYSED has enhanced its data collection by adding student-level attendance data for both in person and remote instructional settings, as well as school-level collections focused on device and connectivity. Additionally, NYSED will continue to require LEAs to report on student achievement as well as other important school-level variables. Collection of these data elements will directly support NYSED's efforts to better understand the pandemic's impact on school communities and identify appropriate actions to meet the academic, social-emotional, and physical health and safety needs of students.

E. Include only information directly related to the waiver request.

Section 8401(b)(3)(A) requires the New York State Education Department to: (1) provide the public and any interested local educational agency in the State with notice and a reasonable opportunity to comment and provide input on the request, to the extent that the request impacts the local educational agency; (2) submit the comments and input to the Secretary, with a description of how the State addressed the comments and input; and (3) provide notice and a reasonable time to comment to the public and local educational agencies in the manner in which the applying agency customarily provides similar notice and opportunity to comment to the public. The New York State Education Department has fulfilled this requirement by:

- Providing notice and information to the public regarding this request for a waiver on their website at: <http://www.nysed.gov/essa/accountability-and-assessment-waivers-public-comment>. In accordance with normal procedures of the Department, the public was provided with ten (10) business days to provide comments.
- Distributing notification of the waiver request and solicitation of comments via email to all district superintendents, school superintendents, charter school officials, and nonpublic school representatives. In accordance with normal procedures of the Department, LEA representatives were provided with ten (10) business days to provide comments.
- Distributing notification of the waiver request and solicitation of comments via email to the State's Title I Committee of Practitioners. In accordance with normal

procedures of the Department, members of the Committee of Practitioners were provided with ten (10) business days to provide comments.

Evidence of public postings and email communication by NYSED has been enclosed for review and consideration.

F. Describe how schools will continue to provide assistance to the same populations served by programs for which waivers are requested and, if the waiver relates to provisions of subsections (b) or (h) of section 1111, describe how the State educational agency, local educational agency, school, or Indian tribe will maintain or improve transparency in reporting to parents and the public on student achievement and school performance, including the achievement of the subgroups of students identified in section 1111(b)(2)(B)(xi).

As described above, the requested waiver will allow LEAs to continue to provide services to all students by ensuring that instructional time can be used for immediate academic and social-emotional needs created by COVID-19, including the needs of students with disabilities, English Language Learners, and economically disadvantaged students.

Should you have any questions or need additional information, please feel free to contact me directly at 518-XXX-XXXX.

Sincerely,